INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	3
Argument	4
Conclusion	11
Appendix A	12
Appendix B	13

CITATIONS

CASES:

United States v. *Gilliland*, 312 U.S. 86	7
United States v. *Grimaud*, 220 U.S. 506	9, 10
United States v. *Hutcheson*, 312 U.S. 219	7

STATUTES:

Criminal Code, Sec. 35(A), 18 U.S.C. (1940 ed.) 80, now 18 U.S.C. 1001	6, 7
26 U.S.C. 2800	9
26 U.S.C. 2857	3, 4, 5, 6, 7, 8, 9, 10
26 U.S.C. 3176	8
26 U.S.C. 3793	7

REGULATIONS:

Code of Federal Regulations, Supp. 1940: Secs. 194.75 to 194.81	2, 4, 9

RULES:

Rule 7(c) F.R.Crim.P.	7

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 470

EUGENE V. HENSLEY, JAMES W. HENSLEY, UNITED SALES COMPANY, a corporation, and UNITED DISTRIBUTORS, INC., a corporation, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 180-190) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 29, 1948 (R. 191). The petition

for a writ of certiorari was filed December 20, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the indictment charges offenses against the United States.

2. Whether 26 U.S.C. 2857 authorizes the Commissioner of Internal Revenue to require by regulation that wholesale liquor dealers enter in their daily records the names and addresses of the persons to whom deliveries of distilled spirits are made by them.

3. Whether the regulations promulgated by the Commissioner and approved by the Secretary of the Treasury (Sec. 194.75(a) and (b), C.F.R., Supp. 1940) requiring the wholesale liquor dealers specified in the statute to keep a record of the names and addresses of the persons to whom they deliver distilled spirits is void for vagueness because it does not contain a statement of the contents or a facsimile of the form on which such names and addresses are required to be entered, but merely designates the form by name and number.

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statutes and regulation involved are set forth in the Appendix, *infra*, pp. 12-19.

STATEMENT

An indictment in 69 counts was filed against petitioners and James O. Cox in the District Court for the District of Arizona. Counts 1 to 68, inclusive, are identical except as to the names of the accused, the date of the offense, and the name and address of the person or persons to whom distilled spirits were sent. These counts charged that petitioners and one James O. Cox, then being wholesale liquor dealers, selling or offering for sale distilled spirits in quantities of five wine gallons or more to the same person at the same time, were required to keep daily a record of distilled spirits disposed of by them on a form prescribed by the Commissioner of Internal Revenue, to wit, Form 52B, indicating thereon, among other things, the name and address of the person or persons to whom distilled spirits were sent. It was then charged that petitioners and Cox made false entries in Form 52 B as to the name and address of the person or persons to whom distilled spirits were sent, in violation of 26 U.S.C. 2857. (R. 2-57.) Count 69 charged that petitioners and Cox conspired to commit violations of 26 U.S.C. 2857 by making and causing false entries to be made in the Forms 52 B (R. 57-59).

On motion of the Government at the close of its case, certain of the counts were dismissed (R. 96-97). The jury acquitted Cox on all counts in which he was named as a defendant (R. 101-102). Peti-

tioner Eugene V. Hensley was found guilty on 24 counts (R. 104-108) and was sentenced to imprisonment for one year and fined $2,000 on each (R. 142-143). Petitioner James W. Hensley was convicted on eight counts (R. 103-104) and sentenced to six months' imprisonment and fined $2,000 on each (R. 144-145). Petitioners United Sales Company and United Distributors, Inc., were convicted on five and four counts, respectively, and were each fined $2,000 on each of such counts (R. 99-101, 145-147). All of the sentences are concurrent. On appeal, the judgments of conviction were affirmed (R. 180-191).

ARGUMENT

The meager record on appeal does not contain the evidence adduced at the trial and petitioners raise no question as to the sufficiency of the evidence to show that they made the false entries charged in the indictment.

1. Each count of the indictment described the record in which false entries were alleged to have been made as "Form 52 B". This form is a transcript, rendered monthly under oath, of the daily records of distilled spirits disposed of by a wholesale liquor dealer. The daily record required by the statute, 26 U.S.C. 2857, *infra*, pp. 12-13, and the regulations prescribed by the Commissioner of Internal Revenue, Sections 194.75(a) and (b), C.F.R., Supp. 1940, *infra*, pp. 13-14, is kept on a form described in the regulations as "Record 52".

Petitioners assert (Pet. 9-12) that the statute prescribes a penalty only for making a false entry in the daily records required to be kept, that it does not impose a penalty for making a false entry in the transcript of such records (Form 52 B) which the statute also requires wholesalers to render under oath, and that the indictment therefore fails to state an offense. It does not appear that the court below considered the precise question, and it is not clear that the point was called to the court's attention. We think that the contention is without merit.

Each count of the indictment follows substantially the language of 26 U.S.C. 2857 in charging that petitioners were required to keep a daily record of distilled spirits disposed of by them and that they made a false entry in the record so described. This record is identified in the indictment as Form 52 B, rather than Record 52. It appears that at the trial the various entries introduced which were alleged to be false were taken from Forms 52 B (e.g. R. 67, 109, 137-138). But Form 52 B is simply a sworn monthly transcript of the daily entries required to be made in Record 52. Hence, if we assume that petitioners' construction of the statute is correct, it is obvious that they were not prejudiced by the technical fault in the indictment in identifying the daily records alleged to have been falsified as "Form 52 B". The entries in the sworn Forms 52 B concerning the distilled spirits dis-

posed of must of necessity have been the same as those contained in the daily records kept by petitioners, i.e., Record 52. If they were not the same, petitioners were in a favorable position to determine that fact, for the original records were their own and presumably were in their possession. It was an easy matter for them to ascertain whether the sworn transcripts they had rendered were authentic copies of their original daily records. Consequently, petitioners could not have been taken by surprise or placed at any disadvantage by the fact that the indictment specified Form 52 B in each count as the record in which a false entry had been made.

But even on petitioners' hypothesis that the indictment charged false entries in the sworn monthly transcripts rendered to the Bureau of Internal Revenue (Form 52 B) and that 26 U.S.C. 2857 does not provide a penalty for such false entries, they are in no better position. Section 35(A) of the Criminal Code (18 U.S.C. (1940 ed.) 80, now 18 U.S.C. 1001) provided that "Whoever * * * shall knowingly and willfully * * * make or cause to be made any false or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * * shall be fined not more than $10,000 or imprisoned not more than ten years or both." The making of a false statement in Form 52 B clearly falls within the proscription of this

section. Section 35(A) with its provision as to false and fraudulent papers has its place as a fitting complement to other statutes under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required. *United States* v. *Gilliland,* 312 U. S. 86, 95-96.[1] Thus, in view of the provisions of 26 U.S.C. 2857 and the regulations thereunder relating to Form 52 B, the indictment by necessary implication stated an offense under Section 35(A).

It is true that the indictment did not specifically refer to Section 35(A) of the Criminal Code. But error in the citation of the statute or its omission is not ground for dismissal of an indictment or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice. Rule 7(c), F. R. Crim. P.; *United States* v. *Hutcheson,* 312 U. S. 219, 229. It is difficult to see how petitioners could have been misled or prejudiced by the omission of a reference to this statute in preparing their defense to charges that they made false statements in the transcripts of their own records. In this connection, petitioners appear to be in the position of not challenging the findings of the jury that the copies of their own

[1] See also 26 U. S. C. 3793 which imposes a penalty of imprisonment of from one to five years for "Every person who * * * falsely or fraudulently executes or signs any * * * entry or other document required by the provisions of the internal revenue laws."

records submitted by them under oath contained false statements and at the same time contending that the prosecution must fail because the Government did not allege and prove directly that the false statements were in their original records from which they made the sworn copies.

2. Petitioners also contend (Pet. 13-14) that 26 U.S.C. 2857 requires only that wholesale liquor dealers keep records of the quantities of distilled spirits received and disposed of, that it does not require such dealers to keep records of the names and addresses of the persons to whom distilled spirits are sent, and that the Commissioner was therefore without authority to promulgate a regulation requiring such records to be kept.

We believe that the court below was clearly correct in construing Section 2857 as authorizing the Commissioner to require wholesale liquor dealers to keep records of the names and addresses of persons to whom they send distilled spirits. There is nothing in the language of that section which forbids that construction, and, on the contrary, the language of the section reasonably comprehends it. The section requires the keeping of a "record of distilled spirits received and disposed of," and then provides that such record shall be kept "in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe." And, in addition, 26 U.S.C. 3176 vests the Commissioner, with the approval of

the Secretary, with general authority to prescribe and publish all needful rules and regulations for the enforcement of Chapter 26, Title 26, U.S.C., which relates to the assessment and collection of taxes imposed on distilled spirits and of which Section 2857 is a part. Thus, Congress has required by Section 2857 that a record of distilled spirits received and disposed of be kept, and has also given the Commissioner power to make regulations to carry it into effect, which necessarily embraces the power to supply the administrative details. *United States* v. *Grimaud,* 220 U. S. 506, 516. The unmistakable purpose of Section 2857 is to assist the Government by supplying it with information to be used in connection with the collection of taxes on distilled spirits. The regulations here involved (Sections 194.75 to 194.81, Title 26, C. F. R., Supp. 1940, *infra,* pp. 13-19) are plainly adapted to that purpose. For example, there can be no doubt that information as to the names and addresses of persons who purchase substantial quantities of distilled spirits at wholesale is of great value from time to time in connection with the collection of floor-stocks taxes, for without it the Government might well be at a disadvantage in detecting attempted evasions of the payment of that class of taxes. See 26 U.S.C. 2800 (h), (i), (j), and (k). We submit, therefore, that the Commissioner's regulatory requirement that wholesale liquor dealers keep a record of the names and addresses of

the persons to whom distilled spirits are sent did not go outside of the circle of that which Section 2857 affirmatively required to be done and treated as unlawful if not done. *United States* v. *Grimaud*, *supra*, at 518.

3. Finally, petitioners assert (Pet. 15-22) that the regulation requiring wholesale liquor dealers to keep records of the names and addresses of persons to whom distilled spirits are sent is void for vagueness, because the requirement is found only in the headings of the form on which the record is to be kept and the regulation itself does not contain a facsimile of the form. We do not believe this contention is of sufficient substance to require extended discussion. Petitioners do not contend that they were unable to obtain copies of the necessary forms, or that they were unable to understand the regulation and forms, or that they were, for that reason, unable to comply therewith by filling in the forms with the correct information plainly called for in the headings. See Form 52 B (R. 109). On the contrary, there seems to be no doubt that the false entries made by petitioners in their records could not have been the consequence of their inability to understand the regulation and the forms which were designated therein. After obtaining the forms and making false entries in them, petitioners now contend that the regulation was so vague as to make honest compliance therewith impossible. We submit that such a contention is without merit.

CONCLUSION

The decision of the court below is correct and no conflict of decisions is involved. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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January 1949.

APPENDIX A

26 U. S. C. 2857:

§ 2857. Books of rectifiers and wholesale dealers —(a) Requirements.

Every rectifier and every wholesale liquor dealer who sells, or offers for sale, distilled spirits in quantities of five wine-gallons or more to the same person at the same time shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: *Provided*, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe.

The records required to be kept under the provisions of this section and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.

Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval

of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

Every rectifier and wholesale liquor dealer who refuses or neglects to render transcripts or summaries in the form required by the Commissioner, with the approval of the Secretary, shall, upon conviction, be fined not more than $100 for each such neglect or refusal.

APPENDIX B

Title 26, Code of Federal Regulations, Supp. 1940:

§ 194.75 *Records to be kept by wholesale liquor dealers.* (a) Every wholesale dealer in liquors who sells distilled spirits in quantities of 5 wine gallons or more to the same person at the same time shall keep Record 52, "Wholesale Liquor Dealer's Record," and render monthly transcripts, Forms 52A

and 52B, "Wholesale Liquor Dealer's Monthly Report," and Form 338, "Wholesale Liquor Dealer's Monthly Report (Summary of Forms 52A and 52B)."

(b) Daily entries shall be made on Record 52 of all distilled spirits received and disposed of, as indicated by the headings of the various columns, and in accordance with the instructions printed thereon, not later than the close of business of the day on which the transactions occur: *Provided,* That if the keeping of such separate record is approved by the district supervisor, a wholesale liquor dealer may keep a separate record, such as invoices, of the removal of distilled spirits, showing the removal data required to be entered on Record 52, but the daily entries of the removal of distilled spirits from his premises shall be made on Record 52 not later than the close of business of the following business day.

(c) A dealer who sells wines or malt liquors, or both, in wholesale quantities, and who sells distilled spirits in retail quantities, is not required to keep Record 52 or to file monthly transcripts, Forms 52A and 52B, and report, Form 338.

(d) Wholesale liquor dealers who sell wines and malt liquors only, and wholesale malt liquor dealers are not required to keep Record 52 or to file monthly transcripts, Forms 52A and 52B, and report, Form 338.

§ 194.76 *Separate record of serial numbers of cases.* Serial numbers of cases of distilled spirits disposed of need not be entered on Record 52, provided the proprietor keeps at his place of business a separate record, showing such serial numbers, with necessary identifying data, including the date of removal and the name and address of the consignee, provided the keeping of such record is approved by the district supervisor. Such separate record may be kept in book form (including loose-leaf books) or may consist of commercial papers, such as invoices or bills. Such books, invoices, and bills shall be preserved for a period of 4 years and in such manner that the required information may be ascertained readily therefrom, and, during such period, shall be available during business hours for inspection and the taking of abstracts therefrom by revenue officers. If a record in book form is kept, entries shall be made on such separate approved record not later than the close of business of the day on which the transactions occur. The dealer shall note in Record 52, in the column for reporting serial numbers of spirits disposed of, "Serial numbers shown on commercial records per authority dated ....."

§ 194.77 *Entry of miscellaneous items.* Wholesale liquor dealers may enter on Record 52 as one item the total quantity of different kinds of spirits made up from broken cases sold to the same person

on the same day, provided such total quantity is not in excess of 10 gallons. The entry of such items shall be stated as "Miscellaneous" or "Misc." and shall show the date, the name and address of the person to whom sold, and the quantity. The total quantity of such miscellaneous spirits so disposed of during the month shall be reported in the monthly summary, Form 338, as "Miscellaneous": *Provided,* That the wholesale liquor dealer determines by actual inventory the quantity of each kind of spirits remaining on hand at the end of the month.

§ 194.78 *Place where Record 52 shall be kept.* (a) Except as provided in paragraph (b), the wholesale liquor dealer shall keep Record 52 at the place of business covered by his wholesale liquor dealer special tax stamp, if spirits are received and sent out from such premises.

(b) If the place of business covered by the wholesale liquor dealer special tax stamp is not the same premises where the spirits are received and sent out, the wholesale liquor dealer shall keep his Record 52 at the latter place and render transcripts from such place on Forms 52A and 52B and summary report on Form 338; *Provided,* That, if approved by the district supervisor, a wholesale liquor dealer may keep his Record 52 at the place of business covered by the special tax stamp and render transcripts on Forms 52A and 52B and

summary report on Form 338 from such place. If, however, the place of business covered by the special tax stamp is not in the same supervisory district as the place where the spirits are received and sent out, Record 52 must be kept at the latter place and transcripts on Forms 52A and 52B and summary report on Form 338 rendered to the district supervisor of that district.

§ 194.79 *Wholesale liquor dealer maintaining a retail department.* (a) A wholesale liquor dealer who sells distilled spirits at wholesale and at the same premises sells distilled spirits at retail in his capacity as a retail dealer in liquors, and who maintains a separate retail department, shall keep Record 52 at his wholesale department of all distilled spirits there received and disposed of. Distilled spirits transferred from the wholesale department to the retail department shall be reported on Record 52, part 2, as "Transferred to Retail Department." Where it is necessary in the filling of a wholesale order to take liquor out of the retail department, the quantity removed from the retail department must be shown on Record 52, part 1, as "Transferred from Retail Department," and the entire sale shown in Record 52, part 2, as a disposal.

(b) The retail department need not be maintained in a separate room or be partitioned off from the wholesale department, but the retail department must in fact be separate from the wholesale department.

(c) Where a wholesale liquor dealer sells at both wholesale and retail, and does not maintain a separate retail department, all distilled spirits received and disposed of shall be entered on Record 52.

§ 194.80 *Monthly reports.* (a) A wholesale liquor dealer shall file transcripts of Record 52 on Forms 52A and 52B, and a summary report on Form 338, with the district supervisor, on or before the tenth day of the succeeding month. Record 52 shall be preserved for a period of 4 years and, during such period shall be available during business hours for inspection and the taking of abstracts therefrom by any internal revenue officer.

(b) If there be no receipts and disposals of distilled spirits by a wholesale liquor dealer, during any month, it will be necessary to forward monthly summary on Form 338 only to the district supervisor, showing the quantity on hand the first day of the month and the quantity on hand the last day of the month and marked "No transactions during month."

When a wholesale liquor dealer discontinues business as such, he shall render monthly reports, Forms 52A and 52B and the summary report on Form 338, covering transactions for the month in which business is discontinued, and mark such reports "Final." Record 52 shall be preserved by the dealer for a period of 4 years thereafter.

§ 194.81 *Forms to be provided by users at own expense.* Record 52, Forms 52A, 52B, and 338 will be provided by users at their own expense, but must be in the form prescribed by the Commissioner: *Provided,* That, with the approval of the Commissioner, they may be modified to adapt their use to tabulating or other mechanical equipment: *Provided further,* That where the form is printed in book form, including loose-leaf books, the instructions may be printed on the cover or the fly leaf of the book instead of on the individual form.

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